

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

_____)	
LAURA HOLMES and PAUL JOST)	
)	
Plaintiffs,)	No. 16-5194
)	
v.)	
)	MOTION
FEDERAL ELECTION COMMISSION,)	
)	
Defendant.)	
_____)	

MOTION REGARDING BRIEFING SCHEDULE

This case is not before this Court on appeal, but rather under a unique statutory provision that directs the district court to certify constitutional questions to the en banc Court of Appeals, which has exclusive jurisdiction to decide the merits of the case in the first instance. Accordingly, the Federal Election Commission (“FEC”) moves this Court to set a briefing schedule to provide for each side to file two briefs as set forth in the rules governing cross-appeals, Fed. R. App. P. 28.1(c) & D.C. Cir. R. 28.1(b). The Commission contacted counsel for the plaintiffs to ascertain their position on this motion. Counsel for the plaintiffs indicated that they oppose this motion and intend to file an opposition to it.

Plaintiffs Laura Holmes and Paul Jost brought suit on July 21, 2014, to challenge the constitutionality of the Federal Election Campaign Act’s (“FECA” or

the “Act”) then-\$2,600 individual, per-election contribution limit, asserting their desire to make \$5,200 general-election contributions to certain congressional candidates in the November 2014 general elections. *Holmes, et al. v. FEC*, 99 F. Supp. 3d 123, 135-36 (D.D.C. 2015). In their complaint, the plaintiffs invoked FECA’s special judicial review provision, 52 U.S.C. § 30110, which provides that certain enumerated parties may bring suit in the district court “to construe the constitutionality of any provision” of the Act. As this Court has explained, in such actions, the district court must develop a record and make findings of fact, determine “whether the constitutional challenges are frivolous or involve settled legal questions,” and “certify the record and all non-frivolous constitutional questions” to the *en banc* court of appeals. *Wagner v. FEC*, 717 F.3d 1007, 1009 (D.C. Cir. 2013) (per curiam) (internal citations omitted). This Court has further explained that while the district court must fulfill these important threshold functions, section 30110 “grants exclusive merits jurisdiction to the *en banc* court of appeals.” *Id.* at 1011.

On April 20, 2015, following a series of preliminary orders by the district court and this Court sitting *en banc*, the court below issued an order and opinion declining to certify any constitutional questions and granting summary judgment to the Commission. *Holmes*, 99 F. Supp. 3d 123. Plaintiffs appealed and on April 26, 2016, a panel of this Court reversed the portion of the district court’s decision

declining to certify a constitutional question related to plaintiffs' First Amendment claim and awarding summary judgment to the Commission on that claim. *Holmes*, No. 15-5120, --- F.3d ---, 2016 WL 1639680 (D.C. Cir. Apr. 26, 2016). The Court thus remanded the First Amendment issue to the district court with instructions that it be certified to the en banc Court of Appeals. *Id.* at *6.¹

On June 23, 2016, the district court issued an order certifying plaintiffs' First Amendment question to this en banc Court. Order, *Holmes v. FEC*, No. 14-1243 (D.D.C. June 23, 2016). This Court sitting en banc will thus evaluate the merits of plaintiffs' First Amendment challenge in the first instance. *See Wagner*, 717 F.3d at 1011. As such, the briefing by the parties will resemble cross-motions for summary judgment, setting forth the reasons each side is entitled to judgment as a matter of law on the certified First Amendment question. The briefing rules for ordinary appeals — which provide for an appellant seeking review of a district court decision to file two briefs and the appellee only one — are therefore inapplicable. Rather, the closest analog to briefing on cross-motions for summary judgment in this Court is cross-appeals. Federal Rule of Appellate Procedure 28.1(c) specifies that the appellant and appellee in a cross-appeal are to file staggered briefs permitting each party to be heard twice. Accordingly, the briefing

¹ The panel affirmed the district court's judgment declining to certify the plaintiffs' Fifth Amendment equal protection issue. *Holmes*, 2016 WL 1639680, at *5.

schedule adopted by this Court should, like that set forth in Rule 28.1(c), allow each side an equal opportunity to fully address the constitutional questions now before this Court by permitting the parties to each file two briefs. Moreover, because this case is not on appeal and the Commission will be defending the constitutionality of the Act in the first instance, the Court should permit the Commission to file the second and fourth briefs under Rule 28.1. The caption of the case should reflect that plaintiffs are not appellants and the Commission is not an appellee.

Recent decisions from this Court underscore the importance of adopting a briefing schedule that reflects the true nature of this action and accounts for the en banc Court's "exclusive merits jurisdiction," *Wagner*, 717 F.3d at 1011. First, in *Wagner*, a panel of this Court held that section 30110's certification procedure is the *only* means by which the parties enumerated in that provision "may bring actions challenging FECA's constitutionality." *Id.* at 1016. Second, the recent panel decision in this case suggested that a district court may not decline to certify a constitutional question to the en banc court of appeals "simply because the plaintiff is arguing against Supreme Court precedent so long as the plaintiff mounts a non-frivolous argument in favor of overturning that precedent." *Holmes*, 2016 WL 1639680, at *4; *but see Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 192 n.14 (1981) ("concluding that case was properly certified where, *inter alia*, "the issues

here are neither insubstantial *nor settled*” (emphasis added)); *Wagner*, 717 F.3d at 1009 (mandating that under section 30110, district courts must determine “whether the constitutional challenges are frivolous *or involve settled legal questions*” (emphasis added)). The panel decisions in *Wagner* and *Holmes* collectively signify the likely increase of section 30110 cases that are certified to the en banc courts of appeals for the appellate courts’ consideration, in the first instance, of future constitutional challenges to FECA. Those decisions thus highlight the importance of allocating appropriate and fair opportunities to each party to address the constitutional questions raised in such cases.

For the foregoing reasons, the Commission respectfully moves this Court to adopt an equitable briefing schedule similar to that set forth for cross-appeals in Rule 28.1(c), which permits each side to file two briefs.

Respectfully submitted,

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June 30, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of June, 2016, I electronically filed the Commission’s Motion Regarding Briefing Schedule with the Clerk of the Court of United States Court of Appeals for the D.C. Circuit by using the Court’s CM/ECF system.

Service was made on the following through the CM/ECF system:

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